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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 43

CENTRAL STATES COOPERATIVES, INC., a corporation,

Petitioner,

vs.

WATSON BROS. TRANSPORTATION COMPANY, INC., a corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR CERTIORARI.

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Summary of the Argument.

1. The controversy between the parties hereto has not now become moot and there presently exists a real controversy involving substantial rights between the parties, under the laws of the State of Illinois which determine the substantive rights of the parties in this cause.

(a) Maintaining the validity of the judgment as a final adjudication of the plaintiff's right of possession at the time of the commencement of the suit is essential in subsequent litigation between the parties. This right and the right to recover on the appeal bond are presently existing and substantial rights plaintiff is seeking to protect by this petition for certiorari.

2. Upon this controversy the petitioner here was denied a hearing on the merits of the appeal in the Circuit Court of Appeals, not because the Circuit Court of Appeals held there was no longer a substantial controversy involved, but because the Circuit Court of Appeals held the statute in question unconstitutional and held that the trial court was without jurisdiction of the matter.

3. The effectual relief which the petitioner here seeks is the reversal of the judgment of the Circuit Court of

Appeals so that the petitioner may seek the affirmance of the judgment of the trial court.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 748

CENTRAL STATES COOPERATIVES, INC.,
a corporation,
Petitioner,

vs.

WATSON BROS. TRANSPORTATION COMPANY,
INC., a corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR CERTIORARI.

May It Please the Court:

STATEMENT.

Your petitioner respectfully states to the Court that the defendant in this case employed the processes and procedures of the Federal Courts for the purpose of retaining possession of the plaintiff-petitioner's premises, thereby causing to the plaintiff-petitioner herein substantial

losses of rent, damages and costs. These are now sought to be recovered from the defendant in an entirely separate action at law in the state court, referred to in respondent's brief in opposition, Exhibit 2, page 16.

The plaintiff commenced its action in the state court for possession of the premises in question on October 2, 1946. On defendant's petition the cause was removed to the federal district court and there proceeded to judgment on December 23, 1946 in plaintiff's favor. The defendant prosecuted an appeal, during the pendency of which the plaintiff on July 14, 1947 sold and conveyed the premises in question to Yellow Terminals, Inc. But the defendant did not surrender possession to such grantee until December 4, 1947.

The defendant, in prosecuting its appeal from the judgment for possession, rendered against it in the case at bar in the District Court of the United States, filed an appeal or supersedeas bond in the amount of $20,000.00 (R. 149, 150), specifically to indemnify the plaintiff against such losses. The defendant now seeks to escape the binding effect of this judgment and the liability on that bond.

The substantial issues and matters in controversy involved in this case are, first, the right of the plaintiff to maintain the validity of the judgment of the trial court adjudicating in its favor its right to possession on October 2, 1946, of the premises in question, rendered at a time, December 23, 1946, when the defendant was still forcibly withholding possession of the premises from the plaintiff; and, further, the right of the plaintiff to recover upon the appeal bond the rent, damages and costs sustained by the plaintiff by reason of not being let into

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possession under the judgment of the District Court during the pendency of the appeal.

The validity of the judgment is vital to the petitioner as a final adjudication of its right to possession on October 2, 1946, so that this question shall not have to be retried. The judgment is also of vital concern to the plaintiff because of the plaintiff's position and obligation on its warranty deed to its grantee. The bond is of substantial importance as assurance of the collectibility of such rent, damages and costs for which the defendant may be found liable.

ARGUMENT.

I.

The controversy between the parties hereto has not now become moot and there presently exists a real controversy involving substantial rights between the parties, under the laws of the State of Illinois which determine the substantive rights of the parties in this cause.

(a) Maintaining the validity of the judgment as a final adjudication of the plaintiff's right of possession at the time of the commencement of the suit is essential in subsequent litigation between the parties. This right and the right to recover on the appeal bond are presently existing and substantial rights plaintiff is seeking to protect by this petition for certiorari.

The substantive rights of the parties to this cause are determined by the laws of the State of Illinois, where the property in question is located and where the contractual relations between the parties, if any, were entered into. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64 82 L. Ed. 1188, 58 S. C. 817, 114 A. L. R. 1487.

The circumstances in the relationship of the parties in the case of *Heitmuller* v. *Stokes,* 256 U. S. 359, cited by the respondent, may well have been such, under the laws of the District of Columbia where the action arose, as to have brought to an end, by reason of the sale by the plaintiff of the property there in question, the controversy between the parties as to the possession of the premises. In such case, of course, the issue as to the right of possession became moot. But it does not follow in all cases,

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where the plaintiff in a suit for possession may have sold and conveyed the property involved after judgment in his favor, that the plaintiff should be held to have surrendered or waived the right to maintain the validity of a judgment for possession against reversal on appeal.

In the circumstances of the case at bar, the question of the right of the plaintiff to the possession of the premises on October 2, 1946, when the suit was brought, is still a matter of important substantive right between the parties under the laws of the State of Illinois. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

The issue before the trial court was the plaintiff's right to possession at the time of the commencement of the suit on October 2, 1946. The judgment entered on December 23, 1946 adjudicated the plaintiff's right to possession of the premises on the date of the commencement of the suit. Such issue is still the principal issue on the merits of this case, and is the right which the plaintiff was defending as appellee in the Circuit Court of Appeals. It is the rule in Illinois that a conveyance by the plaintiff, in a suit for possession of certain property, will not defeat the plaintiff's right to maintain the validity of its judgment for possession against reversal on appeal

In *Bell* v. *Bruhn*, 30 Ill. App. 300, the court says, page 301:

> "After the suit was commenced, the appellee conveyed the premises, so that his right to the possession had terminated *pendente lite*. He was, however, at the commencement of the suit, entitled to the possession and his recovery inures to the benefit of his grantee. So held in ejectment; *Mills* v. *Graves*, 44 Ill. 50; and one of the reasons there assigned is that it is the policy of this State to promote the easy sale and conveyance of land, and not to prevent such con-

veyance during the long period which may be consumed in litigation. That reason applies to suits of this character with, at least, part of the force that it does to ejectment. No good would result from a contrary doctrine."

In *Daggitt* v. *Mensch*, 41 Ill. App. 304, affirmed 141 Ill. 395, 31 N. E. 153, the court said, page 405:

"We have held that a conveyance *pendente lite* by the plaintiff in an action of forcible detainer, does not affect his right to recover, if at the commencement of the suit he was entitled to the possession. *Bell* v. *Bruhn*, 30 Ill. App. 300. And the same result attends any change of possession. *Patterson* v. *Graham*, 40 Ill. App. 399."

In *Hickox* v. *Armstrong*, 181 Ill. App. 107, the court says at page 109:

"The law is well settled in this state, that where the possession of property is delivered to the plaintiff in an action of forcible detainer, after the institution of the suit, in the absence of proof of settlement, the plaintiff may still prosecute the action to judgment."

In *Patterson* v. *Graham*, 40 Ill. App. 399, affirmed 140 Ill. 531, 30 N. E. 460, the court said, page 404:

"It is also contended that appellee had no right to a judgment, for the reason that while the action was pending, the possession of the premises was delivered up by the delivery of the key thereof to appellee's counsel. There is no evidence that the key was offered or received as a compromise of the forcible detainer proceeding, and without such intention, receiving a surrender of premises pending such a proceeding, would not terminate the suit. The proceeding is to determine plaintiff's right to the possession at the time it was commenced, and he could not assert in the case a right to possession, which did not accrue until after the action was begun. The judgment re-

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lates to the right of possession, which was claimed when the proceeding was instituted, and it is for the withholding of the possession against such right wrongfully that the signers of the appeal bond became liable. A plaintiff has the right to pursue his proceeding to judgment, after he has, pending the action, obtained possession, for the purpose of fixing liability on the appeal bond for the wrongful detention of the premises. *Bell* v. *Bruhn*, 30 Ill. App. 300."

The same rule has applied in Illinois to actions of ejectment. In *Johnson* v. *Shinkle*, 50 Ill. 137, an action of ejectment was commenced and it appeared that subsequent to the filing of the suit, the plaintiff had sold and conveyed the land in controversy. The defendant objected that the plaintiff was no longer entitled to the premises. The court said, page 138:

"The question presented by this record was decided at the April term, 1867, in *Mills* v. *Graves*, 44 Ill. 50. We there held that a conveyance by the plaintiff in an action of ejectment, pending the suit, would not defeat his right of recovery, which would enure to the benefit of his grantee.

"The circuit court should have rendered a judgment for the recovery of the possession, and that the plaintiff have his writ of *habere facias possessionem*."

In *Mills* v. *Graves*, 44 Ill. 50, the court says, page 51:

"It cannot have been the intention of the legislature to prevent the conveyance of lands during the long period through which the plaintiff in ejectment may often be kept in the courts, although the owner of a clear paramount title; and this may be asserted with the more confidence in view of our short statutes of limitation, under whose operation the grantee of a plaintiff in ejectment, or a purchaser under judgment and execution against the plaintiff, might be often barred from prosecuting a new suit. Neither can we discover any practical objection to allowing

a plaintiff in ejectment to recover, notwithstanding a conveyance pending the suit. The recovery would be under the title upon which the suit was brought, and would practically inure to the benefit of his grantee. To allow the recovery would also be in strict conformity to the issue made by the pleadings."

In *Golden* v. *Menker*, 132 Ill. App. 25, on page 29 the court says:

"Certain questions were asked the witness Clemens by appellant's attorney, on cross-examination, for the purpose, as is indicated by the argument of appellant's counsel, of proving that appellee, at the time of the trial, was not entitled to possession of the premises. Objections to these questions were properly sustained. The material question was, whether appellee was entitled to possession when he brought suit, and notwithstanding he may have conveyed all his interest to a third person after suit brought, the suit might properly proceed to judgment in his name for the benefit of his grantee. *Bell* v. *Bruhn*, 30 Ill. App. 300; *Daggitt* v. *Mensch*, 41 *ib.* 403."

In *Glanz* v. *Ziabek*, 233 Ill. 22, 84 N. E. 36, on page 25 the court says:

"It is further contended that since the commencement of this suit the plaintiffs have conveyed said premises, and that fact alone, it is said, is a bar to plaintiffs' right to recover. In *Mills* v. *Graves*, 44 Ill. 50, this court held that it was sufficient for the plaintiff to show, in ejectment, that he was entitled to recover the premises sued for at the time of the commencement of the suit, and that a conveyance to a third party by a plaintiff, pending the action, would not defeat the action, and that a recovery by the plaintiff in such case would inure to the benefit of his grantee. The doctrine of that case was approved in *Johnson* v. *Shinkle*, 50 Ill. 137, and in *Converse* v. *Dunn*, 166 id. 25, and is the settled law of this State."

Moreover, in an action of forcible detainer, under the statutes of the State of Illinois (Ill. Rev. Stat. 1945, Chap. 57, Sec. 2), as was held in *Hammond* v. *Doty*, 184 Ill. 246, 56 N. E. 371, only the immediate right of possession is involved and the title to the premises cannot be called in question.

In *Palmer* v. *Frank*, 169 Ill. 90, 48 N. E. 426, the court held that the defendant must not attempt to try title but must attack the plaintiff's right to possession. It has been further held in a number of Illinois cases that the question in an action of forcible detainer is not in whom is the title to the premises, but is one of possession and the right to possession. *Smith* v. *Hollenback*, 51 Ill. 223; *Pearson* v. *Herr*, 53 Ill. 144; *Hooper* v. *Buvidas*, 239 Ill. App. 596.

It was further held in *Stoddard* v. *Illinois Improvement & Ballast Co.*, 271 Ill. 98, 110 N. E. 870, that a freehold was not involved in a case of forcible entry and detainer. It has also been held in *West Side Trust & Savings Bank* v. *Lopoten*, 358 Ill. 631, 193 N. E. 462, that the right to possession is all that is involved or can be determined in proceedings under the forcible entry and detainer act of the State of Illinois.

The mere fact that the defendant has shown that the plaintiff has conveyed the premises in question and that the grantee of the plaintiff has belatedly been admitted by the defendant to possession of the premises, ought not deprive the plaintiff of its right to maintain on appeal the validity of the judgment previously rendered in favor of the plaintiff for possession of the premises. Moreover, the defendant is liable upon its appeal bond for the payment to the plaintiff of the reasonable rental value of said premises, damages and costs during the period when the defendant unlawfully detained posses-

sion of the premises from the plaintiff, for which to date the defendant has paid to the plaintiff nothing.

We believe that the plaintiff is entitled to observe that it would be a travesty on justice and an abuse of the process of the federal courts, if the defendant could by the very delays occasioned by the defendant in these proceedings, defeat the substantial rights of the plaintiff; if the defendant can have compelled the plaintiff to bear the heavy financial burdens of the premises while escaping liability on its appeal bond; and if it can have compelled the plaintiff not to have conveyed the premises on pain of the reversal of the judgment of the trial court. It would seem to the plaintiff a strange conclusion of the case, after the plaintiff had obtained a judgment for possession, were such judgment vacated and the suit dismissed because later the plaintiff conveyed title to its property. The plaintiff went to great pains and expense to secure an adjudication of the trial court that it was entitled to possession of the premises on October 2, 1946. The defendant has shown no reason why the plaintiff should not have and be entitled to the benefit of such adjudication. The plaintiff, therefore, respectfully submits that under the laws of the State of Illinois and the facts of this case, the issues in this cause have no become moot, and that there are substantial issues which are still the subject matter of this litigation.

II.

Upon this controversy the petitioner here was denied a hearing on the merits of the appeal in the Circuit Court of Appeals, not because the Circuit Court of Appeals held there was no longer a substantial controversy involved, but because the Circuit Court of Appeals held the statute in question unconstitutional and held that the trial Court was without jurisdiction of the matter.

It was the interjection, for the first time, by the defendant, while the case was pending in the Circuit Court of Appeals on the merits of the defendant's appeal, of the constitutional and jurisdictional question which resulted in depriving the plaintiff of the right to seek the affirmance of its judgment. If upon *certiorari* such statute should be found constitutional, the plaintiff would then be entitled to a hearing and disposition in the Circuit Court of Appeals of the appeal on the merits which involve rights substantial to the plaintiff. Having involved the plaintiff in the toils of federal procedural and constitutional questions, in what originally was a summary proceeding for possession, the defendant now seeks to raise itself by its own persistent unlawful conduct out of the effect upon it of the adjudication against it and out of liablility on its bond.

III.

The effectual relief which the petitioner here seeks is the reversal of the judgment of the Circuit Court of Appeals so that the petitioner may seek the affirmance of the judgment of the trial Court.

To have been so summarily ousted by the Circuit Court of Appeals from the federal courts to which the defendant took the plaintiff over its objection, when the defendant was no longer pleased with the results there, on the grounds of the unconstitutionality of the Act invoked by the defendant on removal, is the grievance against which the plaintiff herein seeks effectual relief.

Conclusion.

It is therefore respectfully submitted that, by reason of the foregoing, a Writ of Certiorari should be granted herein and that this Court should review the decision of the United States Circuit Court of Appeals for the Seventh Circuit and reverse the same and remand the cause for further proceedings as to this Court shall seem proper.

Respectfully submitted,

THOMAS G. MCBRIDE,
GEORGE E. BILLETT,
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